



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application of

**Applicants:**

SHANKS, Steven C. and TUCEK, Kevin B.

**Title of Invention:**

Multi-Probe Device

**Filed:**

July 1, 2003

**Serial Number:**

10/612,504

**Atty Docket No.:**

206-038

**Examiner:** Henry M. Johnson, III

**Art Unit:** 3739

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**APPEAL BRIEF**

Mail Stop Appeal Brief  
Commissioner of Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

Dear Sir:

A Notice of Appeal was filed May 2, 2006 which subsequently requires an appeal brief to be filed within two months. This Appeal Brief is submitted within three months of the Notice of Appeal and Applicants petition for a one-month extension. A charge form for the appeal fee of \$250 and the extension fee of \$60 accompanies this brief.

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**Appendix R-2**



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

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*In re Application of*

**Applicants:** SHANKS, Steven C. and TUCEK, Kevin B.

**Title of Invention:** Multi-Probe Device

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**APPEAL BRIEF**

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## Cases Cited

*In re Fulton*, 391 F. 3d 1195, 73 USPQ2d 1141 (Fed. Cir. 2004)

*In re Gordon*, 733 F.2d 900, 221 USPQ 1125 (Fed. Cir. 1984)

*In re Grasselli*, 218 USPQ 769 (Fed. Cir. 1983)

*Hansgirk v. Kemmer*, 40 USPQ 665 (CCPA 1939)

*In re King*, 231 USPQ 136 (Fed. Cir. 1986)

*In re Oelrich and Divigard*, 212 USPQ 323 (CCPA 1981)

*In re Ratti*, 123 USPQ 349 (CCPA 1959)

*In re Rijckaert*, 28 USPQ2nd 1955 (Fed. Cir. 1993)

*In re Rouffet*, 149 F.3d 1350, 47 USPQ2d 1453 (Fed. Cir. 1998)

*MEHL/Biophile Int'l Corp. v. Milgraum*, 52 USPQ2d 1303 (Fed. Cir. 1999)

*Verdegaal Brothers, Inc. v. Union Oil Company of California*, 2 USPQ2d 1051 (Fed. Cir. 1987)

## List of References

- R-1** Applicants' Specification and Drawings of U.S. Patent Application No. 10/612,504, as amended (referred to herein as the "Pending App.")
- R-2** U.S. Patent 6,074,411 issued to Lai (referred to herein as "Lai")
- R-3** U.S. Patent 6,267,779 issued to Gerdes (referred to herein as "Gerdes")
- R-4** Office action dated November 10, 2005

*Copies of the references above are included in the References Cited Appendix*

Manual of Patent Examining Procedure, Eighth Edition, August 2001, Rev. 4 October 2005

MPEP §2112.02

MPEP §2142

MPEP §2143.01

MPEP §2146

**I. Real Party in Interest**

The real parties in interest are the inventors, Steven C. Shanks and Kevin B. Tucek.

Appellants note that, in the event a terminal disclaimer is required to avoid a double-patenting type obviousness rejection, upon a notice of allowance and assuming such terminal disclaimer is still required, Applicants will file a terminal disclaimer and an assignment fully complying with 37 CFR § 1.321 and 37 CFR § 3.73. In such case, the real parties in interest will include Erchonia Patent Holdings, LLC, owned in the majority by the inventors.



## II. Related Appeals and Interferences

No appeals or interferences are pending which may be related to, directly affect, be directly affected by, or have a bearing on the Board's decision in the pending appeal, however the following are, or were, copending patent applications or litigation related to the application on appeal:

Type	Application or Patent Number	How Related to Application on Appeal	Atty Docket Number
US Patent	6,605,079	this patent claims the benefit of common priority application U.S. Provisional Application No. 60/273,282	206-001
US Patent	09/932,907 now U.S. Pat. No 6,746,473	this application claims the benefit of common priority application U.S. Provisional Application No. 60/273,282	206-002
PCT Application	PCT/US2002/019359	PCT application, and national stage applications and issued patents therefrom, claim the benefit of the common priority application US Pat. Application No. 09/932,907, now U.S. Pat. No 6,746,473, which claims the benefit of common priority application U.S. Provisional Application No. 60/273,282	206-021
CIP of related application	10/772,973	this application claims the benefit of common priority application U.S. Application No. 09/932,907, now U.S. Pat. No 6,746,473, which claims the benefit of U.S. Provisional Application No. 60/273,282	206-024
CIP of related application	10/772,738	this patent application claims the benefit of common priority application U.S. Application No.	206-032

		09/932,907, now U.S. Pat. No 6,746,473, which claims the benefit of U.S. Provisional Application No. 60/273,282	
judicial proceeding in Federal District Court of Colorado*	04-MK-1769 (CBS)	litigation alleging infringement of U.S. Pat. No 6,746,473 and invalidity thereof, et alia. U.S. Pat. No 6,746,473, which claims the benefit of U.S. Provisional Application No. 60/273,282	206-066
CIP of Patent Application on appeal	11/443980	this application claims the benefit of the application on appeal, which claims benefit of the common priority application 09/932,907, now U.S. Pat. No 6,746,473, which claims the benefit of U.S. Provisional Application No. 60/273,282	206-071
DIV of Patent Application on appeal	11/431257	this application claims the benefit of the application on appeal, which claims benefit of the common priority application 09/932,907, now U.S. Pat. No 6,746,473, which claims the benefit of U.S. Provisional Application No. 60/273,282	206-133

\* A Markman hearing was held in Colorado District Court action 04-MK-1769 (CBS) to construe certain claims of U.S. Patent No. 6,746,473, which claims the benefit of common priority application 09/932,907, now U.S. Pat. No. 6,746,473. That decision is attached in the Related Proceedings Appendix as Appendix RP-1. No other decisions have been rendered by a court or the Board in any proceeding identified under this section.

**III. Status of the Claims**

Claims 1-10, 13-30, and 32 of U.S. Patent Application No. 10/612,504 are pending and stand rejected twice and constitute the subject matter of this appeal. Claims 11-12, 31, 33 -34 have been cancelled. Claims 35-39 were withdrawn by the Examiner.

**IV. Status of Amendments**

Applicant proposed amendments subsequent to the final office action dated November 10, 2005. Those amendments were considered, but not entered, by the Examiner.

Claim amendments made in response to an office action dated June 3, 2005 were entered by the Examiner in an office action dated November 10, 2005. Those amended claims constitute the subject matter of this appeal and appear in the Claims Appendix as Appendix A.

**V. Summary of Claimed Subject Matter**

In U.S. Patent Application No. 10/612,504, the Applicants present a single laser device that enables a practitioner to personally and freely treat different areas of a patient at the same time. Pending App. paragraphs [0005], [0006], [0007] and [0024] and Fig. 7. This is an improvement over prior art because earlier devices could not freely treat different areas of a patient at the same time.

The claimed device also enables a practitioner to personally and freely treat a patient using multiple laser beam emissions each with a specific spot shape, such as a line. Pending App. paragraphs [0018], lines 1-3. This has the advantage of enabling the practitioner to more precisely define the surface area the laser impinges upon. A copy of Applicants' specification, as amended, and drawings are enclosed for easy reference as Appendix R-1. The claims on appeal are listed in the Claims Appendix.

**A. Independent Claim 1**

Claim 1 defines a device (Pending App. paragraph [0015], line 1) having two or more handheld probes (Pending App. paragraph [0015], line 4). Each of the probes houses one or more laser energy sources (Pending App. paragraph [0016], lines 1-3) and each laser energy source produces a laser beam that is shown through an optical arrangement to produce a desired spot shape (Pending App. paragraph 0017, lines 1-3). Each probe is moved freely by the user while the laser beams are being emitted (Pending App. paragraphs [0015] and [0024]; Fig. 7).

**B. Independent Claim 23**

Claim 23 generally defines the same device as claim 1, except that it specifies that the laser energy sources must be semiconductor laser diodes and adds a control circuit for controlling the laser beams. Specifically, Claim 23 covers a laser device (Pending App. paragraph [0015], line 1) having first and second handheld probes (Pending App. paragraph [0015], line 4). Each of the probes has a semiconductor diode (Pending App. paragraph [0022], lines 3-7) laser energy source (Pending App. paragraph [0016], lines 1-3), and each laser energy source produces a laser beam that is shown through an optical arrangement to produce a desired spot shape (Pending App. paragraph [0017], lines 1-3). There is a control circuit for independently controlling each of the laser beams (Pending App. paragraph [0020], lines 1-9). Each probe is freely moved by the user's hand relative to the surface of the skin of a patient while emitting the first laser beam (Pending App. Paragraphs [0015] and [0024]; Fig. 7).

**C. Independent Claim 30**

Claim 30 generally defines the same device as claim 1 except that it specifies that each laser beam emits a different wavelength of visible light. Specifically, Claim 30 covers a device having two or more laser energy sources (Pending App. paragraph [0016], lines 1-3) housed in two or more handheld probes (Pending App. paragraph [0015], line 4). Each laser beam emits a visible wavelength (Pending App. paragraph [0022], lines 2-8) shown through an optical arrangement to produce a desired spot shape (Pending App. paragraph [0017], lines 1-3). Each probe can be moved freely by the user while the laser beams are being emitted (Pending App. Paragraphs [0015] and [0024]; Fig. 7).

None of the claims on appeal recite means-plus-function limitations.

**VI. Grounds of Rejection to be Reviewed on Appeal**

- A. Are Claims 1, 2, 8-10, 13-15, 22, 30 and 32 unpatentable under 35 USC 102(b) as being anticipated by U.S. Patent 6,074,411 issued to Lai?**
- B. Are Claims 3-7, 16-22, and 23-29 unpatentable under 35 USC 103(a) as being obvious in light Lai in view of U.S. Patent 6,267,779 issued to Gerdes?**
- C. Are Claims 1-10, 13-14, 17, 18, 21, and 23-27 unpatentable as double-patenting claims 1-11 and 13 of U.S. Patent 6,746,473 issued to Shanks and Tucek??**

**VII. Argument**

**A. Lai Does Not Anticipate Applicants' Claims under 35 USC 102(b)**

***Legal Standard for Anticipation***

A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference. *Verdegaal Brothers, Inc. v. Union Oil Company of California*, 2 USPQ2d 1051 (Fed. Cir. 1987). Under the principles of inherency, if the prior art in its normal and usual operation would necessarily perform the method claimed, then the method claimed will be considered to be anticipated. MPEP §2112.02. See *MEHL/Biophile Int'l Corp. v. Milgram*, 52 USPQ2d 1303, 1305 (Fed. Cir. 1999) (citing *In re King*, 231 USPQ 136, 138 (Fed. Cir. 1986)). However, the fact that a certain result or characteristic may occur or be present in the prior art is not sufficient to establish the inherency of that result or characteristic. MPEP §2112.02 (citing *In re Rijckaert*, 28 USPQ2d 1955, 1957 (Fed. Cir. 1993); *In re Oelrich and Divigard*, 212 USPQ 323, 326 (CCPA 1981) (citing *Hansgirk v. Kemmer*, 40 USPQ 665 (CCPA 1939)).

Applicants' burden is to prove that that Lai's device would not perform the claimed invention in its normal and usual operation. See *In re King* at 138.



1. Lai Does Not Anticipate Claims 1, 2, 8-10, 13-15, and 22 Because Lai Does Not Disclose Moving Probes While Emitting Laser Beams

Each of Applicants' claims 1, 2, 8-10, 13-15, and 22 claims handheld probes that "emit one or more laser beams ...while being freely moved by a user's hand..."<sup>1</sup>

Lai does not disclose however, that the probes emit one or more laser beams while being freely moved by a user's hand. Instead, Lai discloses how to eliminate having to hold lasers while they are emitting laser beams, thereby allowing the therapist to perform other tasks during treatment. See Lai column 1, lines 47-48; column 2, lines 25-30.

Indeed all of Lai's claims specifically give the intended use of providing a hands-free laser diode module during laser treatment. See, e.g. Lai column 3, lines 32-33 ("without holding said respective diode laser module by a person's hand"); Lai column 4, line 30 ("without holding by a person's hand").

The fact that a practitioner using the Lai device may move the probes while they emit laser light is not sufficient to establish the inherency of that result or characteristic. During normal and usual operation, a person operating Lai's device would not move the probes while they emit laser light. On the contrary, handholding the probes of Lai's device while they emit laser light would defeat the stated purpose of Lai's invention. Therefore, handheld probes that are freely moveable during laser operation are not inherently disclosed by Lai. Accordingly, claims 1, 2, 8-10, 13-15 and 22 are not anticipated by Lai.

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<sup>1</sup> To forestall any confusion about the placement of the "support structure" limitation in claim 1 without a trailing comma and whether Applicants intended laser beams to be moved during treatment, Applicants note that clause (b)(ii) of claim 1 as amended in the RCE dated April 27, 2005, reads "each of the handheld probes emits one or more laser beams while being freely moved by a user's hand relative to the surface of the skin of the patient."

2. Lai Does Not Anticipate Claims 1, 2, 8-10, 13-15, and 22 Because Lai Does Not Disclose a Beam-Shaping Apparatus

Each of Applicants' claims 1, 2, 8-10, 13-15, and 22 claims "an optical arrangement for receiving one or more laser beams and for transforming each of the laser beams into a desired spot shape."

Lai does not expressly or inherently disclose, however, an optical arrangement to transform the beams into a desired spot shape. Instead, Lai discloses only focusing optics. *See* Lai column 2, lines 33-34. Focus is not the same thing as shape. Focus refers to how clear or fuzzy the image is, whereas shape refers to the perimeter geometry of the image as it impinges the patent's skin. *See* Pending App. paragraph [0017]. Focus is defined in optics as "the clear and sharply defined condition of an image" and "the position of a viewed object or the adjustment of an optical device necessary to product a clear image." RANDOM HOUSE UNABRIDGED DICTIONARY 742 (2<sup>nd</sup> ed. 1987) (attached as Exhibit E-1). A device can emit a laser beam that is in or out of focus, and focusing the beam will not change the resultant shape. That is, focusing optics are not inherent in beam shaping optical arrangements. For example, a linear beam has a linear shape, but may be in or out of focus:



linear beam spot  
in focus



linear beam spot  
out of focus

Similarly a circular beam spot may be in or out of focus:



circular beam spot  
in focus



circular beam spot  
out of focus

Similarly a square beam spot may be in or out of focus:



square beam spot  
in focus



square beam spot  
out of focus

Focusing optics do not necessarily provide an apparatus for obtaining a desired spot shape. Therefore, Lai does not disclose, either expressly or inherently, an optical arrangement for transforming the beam shape, and claims 1, 2, 8-10, 13-15 and 22 are not anticipated by Lai.

3. Lai Does Not Anticipate Claims 1, 2, 8-10, 13-15, and 22 Because Lai Does Not Disclose a Spot Shape

Each of Applicants' claims 1, 2, 8-10, 13-15, and 22 claims "an optical arrangement for receiving one or more laser beams and for transforming each of the laser beams into a desired spot shape."

A spot shape is the result of a beam shape, as explained in Applicants' specification at paragraph [0017]. Lai does not disclose a beam shape, as admitted by the

Examiner on page 4 of the office action dated November 10, 2005: "Lai et al. is discussed above but does not disclose independent control of the lasers, ultraviolet wavelengths or beam shape." Instead, Lai discloses only how to focus a beam. However, focus is not the same thing as shape. Focus refers to how clear or fuzzy the image is, whereas shape refers to the perimeter geometry of the image as it impinges the patient's skin as illustrated in the figures above, which are incorporated into this section by reference. *See also* Pending App. paragraph [0017]. Focus is defined in optics as "the clear and sharply defined condition of an image" and "the position of a viewed object or the adjustment of an optical device necessary to product a clear image." RANDOM HOUSE DICTIONARY AT 742. A device can emit a laser beam that is in or out of focus, and focusing the beam will not change the underlying shape. That is, a spot shape is not inherent in focusing optics.

Lai does not disclose, either expressly or inherently, a spot shape. Therefore, claims 1, 2, 8-10, 13-15 and 22 are not anticipated by Lai.

4. Lai Does Not Anticipate Claims 30 and 32 Because Lai Does Not Disclose Hand-held Probes While Emitting Laser Beams

Each of Applicants' claims 30 and 32 claims "...handheld probes for generating two or more laser beams of only visible light ... wherein each of the handheld probes is retained in a hand of a user and freely moved relative to the surface of the skin of a patient."

Lai does not disclose that the probes emit one or more laser beams while being freely moved by a user's hand. Instead, Lai discloses how to eliminate having to hold lasers while they are emitting laser beams, thereby allowing the therapist to perform other

tasks during treatment. *See* Lai column 1, lines 47-48; column 2, lines 25-30. Indeed all of Lai's claims specifically give the intended use of providing a hands-free laser diode module during laser treatment. *See e.g.* Lai column 3, lines 32-33 ("without holding said respective diode laser module by a person's hand" Lai column 4, Line 30 ("without holding by person's hand").

The fact that a practitioner using the Lai device may move the probes while they emit laser light is not sufficient to establish the inherency of that result or characteristic. During normal and usual operation, a person operating Lai's device would not move the probes while they emit laser light. On the contrary, handholding the probes of Lai's device while they emit laser light would defeat the stated purpose of Lai's invention. Therefore, handheld probes that are freely moveable during laser application are not inherently disclosed by Lai. Accordingly, claims 30 and 32 are not anticipated by Lai.

5. Lai Does Not Anticipate Claims 30 and 32 Because Lai Does Not Disclose a Beam-Shaping Apparatus

Each of Applicants' claims 30 and 32 claims "an optical arrangement attached to each handheld probe for receiving the laser beams and for transforming each of the laser beams into a desired spot shape.

Again, Lai does not expressly or inherently disclose an optical arrangement to transform the beams into desired spot shape. Instead, Lai discloses only focusing optics. *See* Lai column 2, line 30. Focus is not the same thing as shape. Focus refers to how clear or fuzzy the image is, whereas shape refers to the perimeter geometry of the image as it impinges the patent's skin. *See* Pending App. paragraph [0017]. Focus is defined in optics

as “the clear and sharply defined condition of an image” and “the position of a viewed object or the adjustment of an optical device necessary to product a clear image.”

RANDOM HOUSE DICTIONARY AT 742. A device can emit a laser beam that is in or out of focus, and focusing the beam will not change the resultant shape. That is, an optical arrangement for transforming the beam shape is not inherent in focusing optics.

Lai does not disclose, either expressly or inherently, an optical arrangement for transforming the beam shape. Therefore, claims 30 and 32 are not anticipated by Lai.

6. Lai Does Not Anticipate Claims 30 and 32 Because Lai Does Not Disclose a Spot Shape

Each of Applicants’ claims 30 and 32 claims “an optical arrangement attached to each handheld probe for receiving the laser beams and for transforming each of the laser beams into a desired spot shape.”

Again, a spot shape is the result of a beam shape, as explained in Applicants’ specification. Pending App. at paragraph [0017]. Lai does not disclose a beam shape, however, as admitted by the examiner on page 4 of the office action dated November 10, 2005. Examiner’s quote, *supra* p. 19. Instead, Lai discloses only how to focus a beam. Focus is not the same thing as shape. Focus refers to how clear or fuzzy the image is, whereas shape refers to the perimeter geometry of the image as it impinges the patent’s skin as illustrated by the figures above, which are incorporated into this section by reference. *See also* Applicants’ specification at paragraph [0017]. Focus is defined in optics as “the clear and sharply defined condition of an image” and “the position of a viewed object or the adjustment of an optical device necessary to product a clear image.”

RANDOM HOUSE DICTIONARY AT 742. A device can emit a laser beam that is in or out of focus, and focusing the beam will not change the underlying shape. That is, a spot shape is not inherent in focusing optics.

Lai does not disclose, either expressly or inherently, a spot shape. Therefore, claims 30 and 32 are not anticipated by Lai.

***Conclusion***

Applicants have shown that Claims 1, 2, 8-10, 13-15, 22, 30 and 32 are not anticipated under 35 USC 102(b) by Lai, and reversal of the rejection is respectfully requested.

**B. Applicants' Claims are Not Obvious Under 35 USC 103(a)**

***Legal Standard for Obviousness***

To establish a *prima facie* case of obviousness, there must be some suggestion or motivation to modify the reference or combine the teachings. MPEP §2142; *In re Rouffet*, 149 F.3d 1350, 1356, 47 USPQ2d 1453, 1456 (Fed. Cir. 1998); *In re Geiger* 815 F.2d 686, 688, 2 USPQ2d 1276, 1278 (Fed. Cir. 1987). The references must be considered as a whole, and there must be something in the prior art as a whole to suggest the desirability of the combination. MPEP §2142; *In re Fulton*, 391 F.3d 1195, 73 USPQ2d 1141 (Fed. Cir. 2004). Moreover, it is improper to combine references when one teaches away from the combination or renders the device inoperable for its intended purpose. *In re Gordon*, 733 F.2d 900, 902, 221 USPQ 1125, 1127 (Fed. Cir. 1984). *See also* MPEP §2146; *In re Grasselli*, 218 USPQ 769, 779 (Fed. Cir. 1983); *In re Ratti*, 123 USPQ 349, 352, CCPA 1959.

1. Claims 3-7 and 16-22 are Not Obvious in Light of Lai and Gerdes Because Lai Teaches Against Hand-held Probes

Each of Applicants' claims 3-7 and 16-22 teaches probes that are handheld and freely moved by the user's hand. Although Gerdes teaches hand-held wands, Lai expressly teaches away from hand-held wands. It is well-settled law that it is improper to combine references when one teaches away from the combination or renders the device inoperable for its intended purpose. *In re Gordon*, 221 USPQ at 1127.

The problem solved by Lai is how to relieve a practitioner from having to hold laser probes in his hands. Lai accomplishes this by providing laser diode modules that attach onto a patient's body during treatment using a self-adhesive holder. *See* Lai



column 1, lines 38-39. Lai explains that “[i]t has an adhesive surface and allows to attach a diode laser module onto an acupuncture point of a body part *free of hand-holding*.” Lai column 1, lines 46-48 (emphasis added). “Such holding mechanism is particularly advantageous since it *eliminates the need for hand holding the laser module* and allows the therapist to perform other tasks.” Lai column 2, lines 29-31 (emphasis added). Nowhere in Lai’s disclosure is there any suggestion that handheld wands are desirable. Instead Lai expresses the opposite: the desire is not to have hand-held wands. Therefore, Lai expressly teaches against probes that are handheld. Because it is improper to combine references when one teaches away from the combination, Lai and Gerdes should not be combined, and no *prima facie* case of obviousness has been made.

2. Claims 3-7 and 16-22 are Not Obvious in Light of Lai and Gerdes Because Lai Teaches Against Moving Probes While Emitting Laser Beams

Each of Applicants’ claims 3-7 and 16-22 teaches handheld probes that “emit one or more laser beams ...while being freely moved by a user’s hand...”<sup>2</sup> Lai expressly teaches away from moving the probes while laser beams are being emitted. Again, is well settled that it is improper to combine references when one teaches away from the combination or renders the device inoperable for its intended purpose. *In re Gordon*, 221 USPQ at 1127.

The problem solved by Lai is how to relieve a practitioner from having to hold laser probes in his hands while they are emitting laser beams. Lai explains that:

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<sup>2</sup>To forestall any confusion about the placement of the “support structure” limitation in claim 1 without a trailing comma and whether Applicants intended laser beams to be moved during treatment, Applicants note that clause (b)(ii) of claim 1 as amended in the RCE dated April 27, 2005, reads “each of the handheld probes emits one or more laser beams while being freely moved by a user’s hand relative to the surface of the skin of the patient.”

[S]timulating five to ten acupuncture points are [sic] common and each takes typically five to thirty minutes. Thus, a therapist needs to point the laser beam to one acupuncture point then another for a long time. Obviously, using these devices is inconvenient and is time consuming.

Lai at column 1, lines 27-31. Lai goes on to teach how to eliminate having to hold lasers while they are emitting laser beams, thereby allowing the therapist to perform other tasks during treatment. See Lai column 1, lines 47-48; column 2, lines 25-30. Indeed all of Lai's claims specifically give the intended use of providing a hands-free laser diode module during laser treatment. See e.g. Lai column 3, lines 32-33 ("without holding said respective diode laser module by a person's hand"; Lai column 4, line 30 ("without holding by a person's hand). To make Lai's device with hand-held lasers would defeat the purpose of Lai's invention and lead to a device that is inoperative under the basic principles under which Lai is designed to operate. Therefore, Lai expressly teaches against probes that are hand-held while emitting laser beams.

Because it is improper to combine references when one teaches away from the combination or renders the device inoperable for its intended purpose, Lai and Gerdes cannot be combined, and no *prima facie* case of obviousness has been made.

3. Claims 3-7 and 16-22 are Not Obvious in Light of Lai and Gerdes Because the Prior Art Teaches Against Freely Moving the Probes

The explicit purpose of Applicants' invention is to enable a practitioner to personally and freely treat different areas of a patient at the same time. Pending App. Paragraphs [0006] and [0007]. Each of Applicants' claims 3-7 and 16-22 teach handheld probes that "emit one or more laser beams ... while being freely moved by a user's hand

relative to the surface of the skin of a patient.” Gerdes and Lai each teach away from freely moving the probes, albeit for different reasons. It is improper to combine references when one teaches away from the combination or renders the device inoperable for its intended purpose. *In re Gordon*, 221 USPQ at 1127.

Gerdes teaches a device wherein the wands are positioned over the patient in such a manner that the radiation from the wands intersects within the body being treated. *See* Gerdes column 1, lines 9-12; column 4, lines 45-50 and 56-59. Logically, for the laser beams to intersect, the wands must be treating substantially the same area of the patient. It would render Gerdes inoperable to modify it such that the laser beams treated different areas of a patient at the same time because then the laser beams would not intersect. Thus, Gerdes teaches against the probes moving freely.

Lai teaches the use of a self-adhesive holder for each of the diode lasers to attach onto a patient’s body. Lai column 1, lines 38-40. The self-adhesive holder is configured to securely hold the diode laser module and to maintain the laser beam at the acupuncture point. Lai column 2, lines 26-31. It would render Lai inoperable to modify it such that the laser modules moved freely because then they would not be maintained at the acupuncture point.

Because it is improper to combine references when one teaches away from the combination or renders the device inoperable for its intended purpose, and because in this case both prior art references teach away from moving the probes freely, Lai and Gerdes cannot be combined. Accordingly, no *prima facie* case of obviousness has been made.

4. Claim 16 is Not Obvious in Light of Lai and Gerdes Because Neither Lai Nor Gerdes Suggests Using Ultraviolet Laser Light

Applicants' claim 16 claims at least one laser energy source generating a laser beam having a wavelength in the ultraviolet range. Neither Lai nor Gerdes disclose or suggest generating a laser beam having a wavelength in the ultraviolet range.

Lai discloses that the wavelength of the diode laser is selected to have a desirable penetration depth for effectively stimulating an acupuncture point. Lai column 2, lines 43-45. Any wavelength ranged from 500 nm to 1500 nm may be chosen for a variety of acupuncture treatments. Lai column 2, lines 49-51. The range of ultraviolet wavelengths is generally defined as less than 400 nm. Lai does not disclose a wavelength less than 500, and therefore Lai does not disclose ultraviolet wavelengths. The Examiner admits this on page 4 of the final office action dated November 10, 2005 : "Lai et al. is discussed above but does not disclose independent control of the lasers, ultraviolet wavelengths or beam shape." Further, Lai does not indicate that ultraviolet may be used to stimulate an acupuncture point. Therefore, Lai does not suggest using an ultraviolet wavelength.

Gerdes discloses exposing tissue to converging beams of treatment (infrared) radiation having a wavelength of between approximately 900 nm and 1100 nm. Gerdes also discloses aiming (visible) radiation having a wavelength of between approximately 400 nm and 700 nm. Gerdes column 8, lines 53-55; column 9, lines 35-39; column 12, lines 53-60; and all claims. Gerdes does not disclose a wavelength less than 400 nm.

The Examiner alleges on page 5 of the final office action that Gerdes discloses 400 nm of ultraviolet light at column 9, line 38. Gerdes actually refers to

*visible* light at 400 nm, however. Specifically, the Gerdes cite reads in its entirety:

Additionally, each of the *visible* laser radiation sources 170 is also configured to emit radiation having a wavelength preferably between approximately 400 nm to approximately 700 nm, and more preferably between about 635 nm and about 640 nm.

Gerdes at column 9, lines 34-39 (emphasis added). Ultraviolet light is not visible light. Therefore, Gerdes does not suggest an ultraviolet wavelength.

Because each reference affirmatively discloses an operating range and does not disclose operations in the ultraviolet range and because neither the nature of the problem to be solved nor the teachings of Lai suggests the use of ultraviolet wavelengths, neither Lai nor Gerdes suggests using an ultraviolet wavelength. Lacking any suggestion or motivation for an ultraviolet wavelength, no *prima facie* case of obviousness has been made.

5. Claim 17 is Not Obvious in Light of Lai and Gerdes Because Neither Lai Nor Gerdes Suggests a Linear Spot Shape

Applicants' claim 17 requires one of the spot shapes to be substantially linear. Lai does not disclose any beam shape, as the examiner admits on page 4 of the final office action dated November 10, 2005. Examiner's quote, *supra* p. 27. Moreover, while Gerdes discloses that "a wide variety of feathered, diffused, Fresnel, traced, and other types of spread-out patterns are also suitable for use with the present invention," a line is not a "spread-out" spot shape. Instead, a linear spot shape is the antithesis of "spread-out." See Gerdes column 9, lines 45-49. Lacking any suggestion or motivation of a linear beam shape, no *prima facie* case of obviousness has been made.

6. Claim 19 is Not Obvious in Light of Lai and Gerdes Because Neither Lai Nor Gerdes Suggests a Plus-Sign Spot Shape

Applicants' claim 19 requires one of the spot shapes to be in the shape of a plus sign. Again, Lai does not disclose any beam shape, as the examiner admits on page 4 of the final office action dated November 10, 2005. Examiner's quote, *supra* p. 27. Also again, while Gerdes discloses that "a wide variety of feathered, diffused, Fresnel, traced, and other types of spread-out patterns are also suitable for use with the present invention," a plus sign is not a "spread-out" spot shape. Gerdes at column 9, lines 46-49. Lacking any suggestion or motivation of a plus-sign spot shape, no *prima facie* case of obviousness has been made.

7. Claim 21 is Not Obvious in Light of Lai and Gerdes Because Neither Lai Nor Gerdes Suggests Different Spot Shapes

Applicants' claim 21 requires the spot shape of a first laser beam to be different from a spot shape of a second laser beam; that is, the first and second beam shapes are different. Again, Lai does not disclose any beam shape, as the examiner admits on page 4 of the final office action dated November 10, 2005. *Id.* While Gerdes discloses that a "wide variety" of "spread-out" beam shapes can be used, Gerdes not indicate that the beam shapes emitted from the radiation sources can be different from each other. Lacking any suggestion or motivation of a linear beam shape, no *prima facie* case of obviousness has been made.

8. Claims 23-29 are Not Obvious in Light of Lai and Gerdes Because Lai Teaches Against Handheld Probes

Each of Applicants' claims 23-29 teaches probes that are handheld and freely moved by the user's hand. As explained in section VII (B)(1) above, however, the problem solved by Lai is how to relieve a practitioner from having to hold laser probes in his hands. Lai accomplishes this by providing laser diode modules that attach onto a patient's body during treatment using a self-adhesive holder. See Lai column 1, lines 38-39. Lai explains that "[i]t has an adhesive surface and allows to attach a diode laser module onto an acupuncture point of a body part *free of hand-holding*." Lai column 1, lines 46-48 (emphasis added). "The holding mechanism is particularly advantageous since it *eliminates the need for hand holding the laser module* and allows the therapist to perform other tasks. Lai column 2, lines 29-31, emphasis added. Therefore, Lai expressly teaches against probes that are hand-held.

Because it is improper to combine references when one reference teaches away from the combination, Lai and Gerdes cannot be combined, and no *prima facie* case of obviousness has been made.

9. Claims 23-29 are Not Obvious in Light of Lai and Gerdes Because Lai Teaches Against Moving Probes While Emitting Laser Beams

Each of Applicants' claims 23-29 teaches a first handheld probe "from which the first laser beam emits, the first handheld probe ... freely moved by the user's hand relative to the surface of the skin of a patient while emitting the first laser beam."

As explained in section VII (B)(2) above, the problem solved by Lai is how to relieve a practitioner from having to hold laser probes in his hands while they are emitting laser beams. Lai explains that:

[S]timulating five to ten acupuncture points are [sic] common and each takes typically five to thirty minutes. Thus, a therapist needs to point the laser beam to one acupuncture point then another for a long time. Obviously, using these devices is inconvenient and is time consuming.

Lai at column 1, lines 27-31. Lai goes on to teach the laser therapy device art how to eliminate having to hold lasers while they are emitting laser beams, thereby allowing the therapist to perform other tasks during treatment. See Lai column 1, lines 47-48; column 2, lines 25-30. Indeed all of Lai's claims specifically give the intended use of providing a laser diode module "without holding said respective diode laser module by a person's hand." See Lai column 3, lines 32-33; Lai column 4, lines 30. To make Lai's device with hand-held lasers would defeat the purpose of Lai's invention, and lead to a device that is inoperative under the basic principles under which Lai is designed to operate. Therefore, Lai expressly teaches against probes that are hand-held while emitting laser beams.

Because it is improper to combine references when one teaches away from the combination or renders the device inoperable for its intended purpose, Lai and Gerdes cannot be combined, and no *prima facie* case of obviousness has been made.

10. Claims 23-29 are Not Obvious in Light of Lai and Gerdes Because the Prior Art Teaches Against Freely Moving the Probes

The explicit purpose of Applicants' invention is to enable a practitioner to personally and freely treat different areas of a patient at the same time. Pending App.



Paragraphs [0006] and [0007]. Each of Applicants' claims 23-29 teach first and second handheld probes that are "freely moved by the user's hand relative to the surface of the skin of a patient while emitting the [first, second] laser beam." Gerdes and Lai each teach away from freely moving the probes, albeit for different reasons. It is improper to combine references when one teaches away from the combination or renders the device inoperable for its intended purpose. *In re Gordon*, 221 USPQ at 1127.

Gerdes teaches a device wherein the wands are positioned over the patient in such a manner that the radiation from the wands intersects within the body being treated. *See* Gerdes column 1, lines 9-12; column 4, lines 45-50 and 56-59. Logically, for the laser beams to intersect, the wands must be treating substantially the same areas of the patient. It would render Gerdes inoperable to modify it such that the laser beams treated different areas of a patient at the same time, because then the laser beams would not intersect. Thus, Gerdes teaches against the probes moving freely.

Lai teaches the use of a self-adhesive holder for each of the diode lasers to attach onto a patient's body. Lai column 1, lines 38-40. The self-adhesive holder is configured to securely hold the diode laser module and to maintain the laser beam at the acupuncture point. Lai column 2, lines 26-31. It would render Lai inoperable to modify it such that the laser modules moved freely because then they would not be maintained at the acupuncture point.

Because it is improper to combine references when one teaches away from the combination or renders the device inoperable for its intended purpose and because in this case, both prior art references teach away from moving the probes freely, Lai and Gerdes cannot be combined. Accordingly, no *prima facie* case of obviousness has been made.

11. Claim 29 is Not Obvious in Light of Lai and Gerdes Because Neither Lai Nor Gerdes Suggests Using Ultraviolet Laser Light

Applicants' claim 29 claims at least one laser energy source generating a laser beam having a wavelength in the ultraviolet range. Neither Lai nor Gerdes disclose or suggest generating a laser beam having a wavelength in the ultraviolet range.

Lai discloses that the wavelength of the diode laser is selected to have a desirable penetration depth for effectively stimulating an acupuncture point. Lai column 2, lines 43-45. Any wavelength ranged from 500 nm to 1500 nm may be chosen for a variety of acupuncture treatments. Lai column 2, lines 49-51. The range of ultraviolet wavelengths is generally defined as less than 400 nm. Lai does not disclose a wavelength less than 500; and therefore Lai does not disclose ultraviolet wavelengths, as the examiner admits on page 4 of the final office action dated November 10, 2005. Examiner's quote, *supra* p. 27. Further, Lai does not indicate that ultraviolet wavelengths may be used to stimulate an acupuncture point. Therefore, Lai does not suggest an ultraviolet wavelength.

Gerdes discloses exposing tissue to converging beams of treatment (infrared) radiation having a wavelength of between approximately 900 nm and 1100 nm. Gerdes also discloses aiming (visible) radiation having a wavelength of between approximately 400 nm and 700 nm. Gerdes column 8, lines 53-55; column 9, lines 35-39; column 12, lines 53-60; and all claims. Gerdes does not disclose a wavelength less than 400 nm.

The Examiner alleges on page 5 of the final office action that Gerdes discloses 400 nm of ultraviolet light at column 9, line 38. Gerdes actually refers to *visible* light at 400 nm however. Specifically, the Gerdes cite reads in its entirety:

Additionally, each of the *visible* laser radiation sources 170 is also configured to emit radiation having a wavelength preferably

between approximately 400 nm to approximately 700 nm, and more preferably between about 635 nm and about 640 nm.

Gerdes column 9, lines 34-39 (emphasis added). Ultraviolet light is not visible light.

Therefore, Gerdes does not suggest an ultraviolet wavelength.

Because each reference affirmatively discloses an operating range and does not disclose operations in the ultraviolet range and because neither the nature of the problem to be solved nor the teachings of Lai suggests the use of ultraviolet wavelengths, neither Lai nor Gerdes suggests using an ultraviolet wavelength. Lacking any suggestion or motivation for an ultraviolet wavelength, no *prima facie* case of obviousness has been made.

### ***Conclusion***

For one or more reasons above, Applicants have shown that Claims 3-7, 16-22, and 23-29 are not obvious under 35 USC 103(a) in light of Lai and Gerdes. Reversal of the rejections is respectfully requested.

**C. Claims 1-10, 13-14, 17, 18, 21, and 23-27 Cannot be Actually Rejected  
for Double-Patenting Because Claims Are Not Yet Otherwise Allowable**

The Examiner has twice actually rejected claims 1-10, 13-14, 17, 18, 21, and 23-27 for being obvious under the non-statutory (judicially-created doctrine of) double patenting as being unpatentable over claims 1-11 and 13 of U.S. Patent 6,746,473 issued to Shanks and Tucek. However, none of these claims has yet been allowed, and therefore no actual double-patenting can be determined. Heretofore Applicant has stated that upon a notice of allowance, and assuming such terminal disclaimer is still required, Applicants will file a terminal disclaimer and an assignment fully complying with 37 CFR § 1.321 and 37 CFR § 3.73.

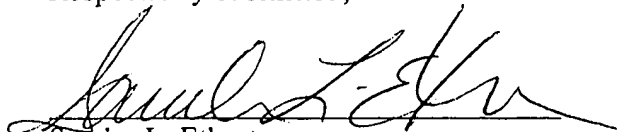
Applicants have shown that Claims 1-10, 13-14, 17, 18, 21, and 23-27 cannot be actually rejected for double-patenting and reversal of the rejection is respectfully requested.

**VIII. Conclusion**

Applicants believe they have shown that none of the Examiner's rejections in the pending application should be sustained. Applicants respectfully request that the Board reverse all the Examiner's rejections and allow the case to proceed to issuance.

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Respectfully submitted,



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## Claims Appendix

1. A multi-probe device comprising:
  - a) two or more laser energy sources, each generating one or more laser beams;
  - b) two or more handheld probes from which the laser beams emit, wherein:
    - i. each of the handheld probes houses one or more laser energy sources therewithin;
    - ii. each of the handheld probes emits one or more laser beams, and each of the handheld probes is not connected to a support structure while being freely moved by a user's hand relative to the surface of the skin of a patient; and
  - c) an optical arrangement attached to each handheld probe for receiving one or more laser beams and for transforming each of the laser beams into a desired spot shape.
2. A device according to claim 1 wherein at least two of the laser beams are emitted simultaneously and impinge two different parts of a patient's body.
3. A device according to claim 1 further comprising one or more control circuits for independently controlling each of the generated laser beams.

4. A device according to claim 1 further comprising a control circuit for controlling the pulse repetition rate of each laser beam.
5. A device according to claim 4 wherein the pulse repetition rate of at least one of the laser beams is such that the laser light emitted is substantially continuous.
6. A device according to claim 4 further comprising a first laser beam having a first pulse repetition rate and a second laser beam having a second pulse repetition rate wherein the first pulse repetition rate and the second pulse repetition rate are different.
7. A device according to claim 4 further comprising a first laser beam having a first pulse repetition rate and a second laser beam having a second pulse repetition rate wherein the first pulse repetition rate and the second pulse repetition rate are the same.
8. A device according to claim 1 wherein each of the laser energy sources is less than one watt.
9. A device according to claim 1 wherein at least one of the laser energy sources is a semiconductor diode.
10. A device according to claim 1 further comprising a base.

13. A device according to claim 1 wherein at least one laser energy source generates a laser beam having a wavelength in the visible range.
14. A device according to claim 13 wherein the wavelength of the laser beam is in the red range of the visible spectrum.
15. A device according to claim 1 wherein at least one laser energy source generates a laser beam having a wavelength in the infrared range.
16. A device according to claim 1 wherein at least one laser energy source generates a laser beam having a wavelength in the ultraviolet range.
17. A device according to claim 1 wherein at least one of the spot shapes is substantially linear.
18. A device according to claim 1 wherein at least one of the spot shapes is substantially circular.
19. A device according to claim 1 wherein at least one of the spot shapes is substantially in the shape of a plus-sign.



20. A device according to claim 1 wherein at least one of the spot shapes is substantially elliptical.
21. A device according to claim 1 further comprising a first laser beam having a first spot shape and a second laser beam having a second spot shape wherein the first spot shape is different from the second spot shape.
22. A device according to claim 1 further comprising a first laser beam and a second laser beam having the same spot shape.
23. A therapeutic laser device comprising:
  - a) a first semiconductor diode laser energy source generating a first laser beam and a second semiconductor diode laser energy source generating a second laser beam;
  - b) a first handheld probe from which the first laser beam emits, the first handheld probe having an interior cavity that houses the first semiconductor laser energy source therewithin and that is freely moved by the user's hand relative to the surface of the skin of a patient while emitting the first laser beam;
  - c) an optical arrangement mounted in the interior cavity of the first handheld probe for receiving the first laser beam and for transforming the first laser beam into a desired spot shape;

- d) a second handheld probe from which the second laser beam emits, the second handheld probe having an interior cavity that houses the second semiconductor laser energy source therewithin and that is freely moved by the user's hand relative to the surface of the skin of a patient and relative to the first handheld probe while emitting a laser beam;
  - e) an optical arrangement mounted in the interior cavity of the second handheld probe for receiving the second laser beam and for transforming the second laser beam into a desired spot shape; and
  - f) a control circuit for independently controlling each of the generated laser beams; and
  - g) wherein the first and second handheld probes are not connected to a support structure while being freely moved relative to the surface of the skin of a patient.
24. A device according to claim 23 further comprising a base.
25. A device according to claim 24 wherein the control circuit is housed in the base.
26. A device according to claim 23 wherein at least one laser energy source generates a laser beam having a wavelength in the visible range.
27. A device according to claim 26 wherein the wavelength of the laser beam is in the red range of the visible spectrum.


28. A device according to claim 23 wherein at least one laser energy source generates a laser beam having a wavelength in the infrared range.
29. A device according to claim 23 wherein at least one laser energy source generates a laser beam having a wavelength in the ultraviolet range.
30. A multi-probe device comprising:
  - a) two or more laser energy sources housed in two or more handheld probes for generating two or more laser beams of only visible light wherein each beam of visible light is emitted at a different wavelength from the other beams of visible light;
  - b) wherein each of the handheld probes is retained in a hand of a user and freely moved relative to the surface of the skin of a patient; and
  - c) an optical arrangement attached to each handheld probe for receiving the laser beams and for transforming each of the laser beams into a desired spot shape.
32. A device according to claim 30 wherein the wavelengths of the laser beams are in the red range of the visible spectrum.

## Evidence Appendix



**Appendix E-1**      Random House Unabridged Dictionary 2<sup>nd</sup> ed., 1987, definition of  
“focus,” meanings 3c and 3d

## Related Proceedings Appendix



**Appendix RP-1** – Order Construing Patent Claim Terms of US Patent 6,746,473.

## References Cited Appendix



- R-1 Applicants' Specification of U.S. Patent Application No. 10/612,504, as amended, and Drawings (referred to herein as the "Pending App.")
- R-2 U.S. Patent 6,074,411 issued to Lai (referred to herein as "Lai")
- R-3 U.S. Patent 6,267,779 issued to Gerdes (referred to herein as "Gerdes")
- R-4 Office action dated November 10, 2005